MAINE SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT

Law Court Docket Number Oxf 21-412

J.P. Morgan Acquisition Corp.

Plaintiff-Appellant

v.

Camille J. Moulton

Defendant-Appellee

ON APPEAL FROM SOUTH PARIS DISTRICT COURT

District Court Docket No. SOPDC-RE-19-02

REPLY BRIEF OF APPELLANT

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I. THE NOTICE AND SUMMARY JUDGMENT

The § 6111 notice at issue contained a discrepancy. However, the math with the itemization containing the credit for the unapplied funds was correct. The difference between the total on page one of the Notice (A. 67), and the total on the "ITEMIZED BREAKDOWN OF THE TOTAL AMOUNT OWED" (A. 71) is precisely the $672.38 with which the borrower is *credited* in the itemization.

The back and forth arguments between the parties, especially about the distinguishing features of the cases finding notice deficiencies will not be repeated here. Despite the exegesis on the different types of ambiguity offered by Appellee, little new was introduced to what was already argued. The 2016 Superior Court case of *Mechanics Savings Bank v. Bellisle,* 061516 MESUP, AUBSC-RE-15-017 is still not helpful. The fatal notice error in *Bellisle, id,* was that the requested amount was not frozen, just like the notice in *Bank of America v. Greenleaf,* 2014 ME 89, 96 A. 3d 700.

Thus, we are left with the question of whether anything *other than* the discrepancy's existence matters at all.

Moulton argues the negative. The trial court agreed, even though language within its ruling questioned how Moulton:

> "would have known that her November 2016 payment had not been fully applied but instead partially applied to September 2016 with the majority held in suspense, and therefore she should have known that she would have to pay the "total amount due" in the attached Itemization and not the "total amount to cure the default" indicated on the front of the notice."(A.18)

And yet, Moulton had admitted the accuracy of the figures, and the correctness of the application of what she also admitted was a short, final payment as part of Plaintiff's Additional Statements 13-17 (A. 43-45)

Nothing contained in Moulton's brief effectively counters Appellant's argument that the Defendant's reliance, Defendant's understanding, or, indeed, whether Defendant opened or read the notice would mattered at all to a trier of fact, had Plaintiff been allowed one.

Context matters, what actually occurred when the notice was received matters, and the fact that Moulton herself was a designated

witness (A. 101) matters; especially when she declined to provide an affidavit.

These things, combined with those items from the record previously argued demonstrate that there was, indeed, an issue of fact meriting trial.

II. APPELLEE'S ARGUMENTS REGARDING *DICTA*

Appellee asks this Court to consider the trial court's comments on standing to have been "dicta" and not part of its findings (Red Br. 21). A review of the Court's ruling yield significant other footnote "dicta", such as note 7 (A. 18). A careful reading of that note, and the entire concluding section of the trial court's seems to demonstrate a misapprehension by the trial court that somehow it *Plaintiff* was seeking a judgment via the motion. In fact, Plaintiff was not seeking a judgment, only that the Defendant's Summary Judgment be denied.

At first, it seemed that perhaps there was merely a typographic reversal of "Plaintiff and Defendant". But the language thread about what the *Plaintiff* had, and had not proven continues beyond note 7. For example, at pg. 8 (A.19), even though the sole grounds for Moulton's Summary Judgment motion was the discrepancy in the

notice, Plaintiff appears to have been required to "prove its foreclosure claim" or "to establish a prima facie case for each element in response to Defendant's motion".

This Summary Judgment ruling should and must be reviewed for error based upon what Appellee was requesting be the result of Defendant's motion; Appellee was *not asking for a judgment, it asked only to be allowed to go to trial.* (A.73 and 76).

That request should have been granted.

III. THE TITLE DECREE

"The title theory of mortgages has been the accepted doctrine in this State since it became a separate [state]." *Johnson v. McNeil,* 2002 ME 99, ¶ 10, 800 A.2d 702 (quoting *First Auburn Trust Co. v. Buck,* 137 Me. 172, 173 (1940)) (internal quotation marks omitted). "A mortgage is 'a conditional conveyance vesting the legal title in the mortgagee,' with only the equity of redemption remaining in the mortgagor." *Id.* (quoting *Martel v. Bearce,* 311 A.2d 540, 543 (Me. 1973))

Therefore, what was at stake before this trial court? Ms. Moulton's interest in the property. This equitable right of redemption represented the extent of what Moulton had possessed

since she deeded the mortgage on March 18, 2009 (A. 50). See *Johnson v. McNeil, supra. ¶11.*

Appellant, with neither authority nor precedent argues that somehow M.R. Civ. P. 80A expands the scope of *any* action regarding real estate to include all aspects of title, compelling trial courts (one supposes) to issue decrees as to the complete state of title of any property upon which it rules, in all cases. (Red Br. 3, 18)

In doing so, Appellant misapprehends M.R. Civ. P 80A's relevance to this foreclosure case, because, the case involved, not the title, but Moulton's equitable right to redeem the property. Moreover, even a favorable mortgagee's judgment doesn't eliminate that right to redeem until months after entry of judgment.

M.R. Civ. P. 80A's applicability to foreclosure actions did not expand the scope of the type, or subject matter of *this* case before *this* trial court. Foreclosure cases are separately designated in subsection (g):

> Foreclosure of Mortgage. An action under this rule **may** be used for the purpose of the foreclosure of real estate as provided by law. (emphasis added)

What is that law? The specific rules governing foreclosure are contained in Title 14, Chapter 713, rather than the later chapters pertaining to actual title. What happens at the end of a successful foreclosure is specifically delineated in 14 M.R.S. §§ 6322 and 6323, discussed below. Title is not affected until and unless a sale occurs.

This was a single count foreclosure case with a single purpose: to "foreclose"[1] Moulton's equitable right of redemption; nothing more (A. 21, *et seq.*).

Moulton mischaracterizes (Red Br. 19.) what Plaintiff sought in the trial court as "declaring the rights, status, and other legal relations of the parties to the Mortgaged Property". What Plaintiff actually sought in the case is stated at the conclusion of its complaint following the words, "WHEREFORE, Plaintiff prays . . ." (A. 23). These included: a declaration of breach, setting of an amount due, finding mortgagee liable should a deficiency occur in

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[1] *Black's Law Dictionary*, 11th Ed. (2019) (online) defines "foreclose" as follows: To terminate a mortgagor's interest in property..... More to the point is the traditional definition as found in the 2nd Ed. (1910) which appears: "To shut out; to bar. Used of the process of destroying an equity of redemption existing in a mortgage".

the future, and issue a judgment (which only starts the redemption period)[2].

Nothing therein, *even had Plaintiff prevailed* would have changed the status of the title to the property. After judgment entry, Moulton's right to redeem the property would have (for months thereafter) *remained* hers to exercise, just as it had since 2009, limited only by time.

Moulton did not bring a counterclaim in this matter seeking a title change, unlike the borrower in *Johnson v. McNeil*, 2002 ME 99, ¶ 2, 800 A2d 702. The issue of whether or not M.R. Civ. P. 13(a) required her to do so with regard to her claimed defects as discussed in *Key Bank Nat. Ass'n v. Sargent*, 2000 ME 153 ¶ 17, 758 A. 2d 528 is not before the Court. Moulton's answer in this case requests nothing from the trial court, affirmative or otherwise (A. 98).

By issuing the Title Decree (A. 9), the trial court erred by *sua sponte* and without notice expanding the scope of the case before it

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[2] A pre-requisite to a sale in which mortgagor may also take part that may, but need not take place after published notice following the expiration of the 90 day redemption period. 14 M.R.S. § 6323

by transforming it into one quieting title as if it had been brought and pleaded pursuant to 14 M.R.S. §§ 6651-6658. This, in effect, added a *de facto* counterclaim.

Appellee has cited no precedent for a trial judge adding a title determination as part of a foreclosure. As stated in the earlier brief, with no actual counterclaim, no concurrent action, no collateral action, and no "second" action in which Defendant made any affirmative claim, the trial court's title decree (A. 19) cannot stand.

Appellee's prediction of what might happen later is not yet ripe. Nor were the cases of *U.S. Bank, N.A. v. Tannenbaum*, 2015 ME 141, ¶ 6 n.3, 126 A.3d 734; and *Wells Fargo Bank, N.A. v. Girouard*, 2015 ME 116, ¶ 10, 123 A.3d 216), cited by *Pushard, supra,* at ¶*12.*

Appellee and the trial court impermissibly jumped the gun. The Law Court's opinions in *Pushard v. Bank of America, N. A.*, 2017 ME 230, 175 A. 3d 103 and *Fed. Nat'l Mortg. Ass'n v. Deschaine,* 2017 ME 190, ¶ 34, 170 A.3d 230 are not immune to examination, five years out. By their own terms they appear to leave open the exploration and effect of arguments not presented or developed back in 2017.

In *Pushard, supra,* in rejecting, as an absurd outcome, the Bank's argument about the effect of 14 M.R.S. § 6111 on its ability to accelerate the note, the Court stated at ¶30: "The Bank has given us no reason why the Legislature would have created such a distinction". This mortgagor respectfully submits that it will be able to do so. Doing so would matter, because it was the *acceleration* which provided the basis for the "destruction" of the note as a basis for ongoing obligation in *Johnson v. Samson Constr. Corp.*, 1997 ME 220, 704 A. 2d 866. What it took to "destroy" the note in *Johnson, id.* is the antithesis of what is required to do the same to a Maine residential mortgage note. These differences put the issue and claim preclusion prohibiting further mortgagor action relied on by the Court in *Pushard, id.* in jeopardy.

In *Deschaine, supra,* the Court said at ¶33, "We find no persuasive justification for carving out an exception to the settled doctrine of claim preclusion that would protect mortgagees from the adverse consequences of judgments ....." There are massive distinctions and differences isolating Maine's judicial foreclosure

cases from other lawsuits which provide ample justification[3] for such an exception in cases *without sanctionable misconduct.* There indeed exist arguments that neither the lenders nor *Amici* advanced in either *Pushard* or *Deschaine* that the Law Court might consider differently in 2022, or 2023.

The case at bar isn't the case in which that examination will occur, because this trial court judgment cannot stand. However, if and when a second action is ever filed after an unsuccessful foreclosure without sanctionable misconduct, that mortgagor, just like Appellant, will have due process rights. Those rights will or may consist of counterclaims, equitable defenses, offsets, with perhaps a different and more persuasive approach to mortgagor's remaining interest.

This trial court overreached. The decree awarding free-and-clear title constituted a separate and distinct error requiring reversal.

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[3] These include, *inter alia,* a unique inability to default a non-appearing borrower, and that a favorable judgment does not eliminate the redemption interest being litigated, but merely starts a months long clock ticking.

IV. STANDING

It is axiomatic that standing is always an issue, since it is standing that renders the foreclosure dispute justiciable, as we know from *Bank of America v. Greenleaf,* 2014 ME 89, 96 A. 3d. 700. The fact that the trial court did not raise standing as an issue until its judgment ruling render a review of that ruling challenging. Certainly affording the parties the opportunity to brief, or at least argue would have more easily allowed review.

At the end of the day, as in *Homeward Residential, Inc. v. Gregor,* 2015 ME 108 ¶24, 122 A. 3d 947, in the absence of sanctionable conduct (such as that found in *Green Tree Servicing v. Cope, 2017* ME 68 ¶ 14, 158 A. 3d 931), a finding that a foreclosure plaintiff lacks standing must be dismissed *without prejudice.* The conditions under which that dismissal without prejudice can be granted are limited only by the dismissing court's discretion as to what would be just under the circumstances, including the assessment of costs and fees.

As stated previously, and not effectively countered, if this Court believes that Appellant did, or may have lacked standing to foreclose; given the lack of sanctionable conduct, this matter should be reversed and remanded with instructions that the trial court

determine whether Plaintiff had standing to foreclose. If not, then the trial court should be instructed to dismiss the case without prejudice.

V. CONCLUSION

For all the reasons contained and argued herein, Appellant J. P. Morgan Acquisition Corp. respectfully requests this Honorable Court to:

1) REVERSE the Judgment of the trial court herein and REMAND this matter for trial;

2) Alternatively to REVERSE the Judgment of the Trial Court herein and REMAND this matter with instruction to conduct a hearing regarding whether Plaintiff had or has standing to foreclose, and if not, to enter a DISMISSAL WITHOUT PREJUDICE;

3) Alternatively to REVERSE the Judgment of the trial court and REMAND with instructions to STRIKE the portion of the Judgment entered awarding Defendant title to the subject property unencumbered by the mortgage;

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4) To Award Appellant fees and costs on appeal on such terms as may be just and proper; and

5) For such other and further relief as the Court may deem just and proper.

Respectfully Submitted,

DATED: June 20, 2022

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CERTIFICATE OF SERVICE

I, William A. Fogel, hereby certify that prior to filing the within Reply Brief, that I shall have caused two printed copies to be sent to opposing counsel by mail, and that a copy will be e-mailed to:

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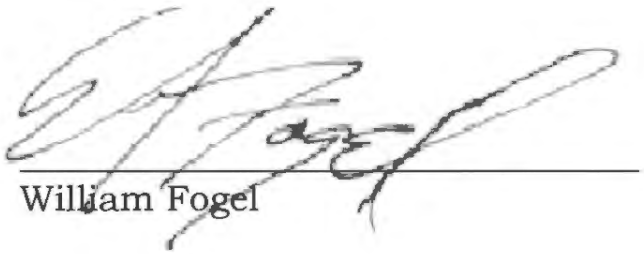

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